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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDEZ SINGLETON MILLSAP,

Defendant and Appellant.

F070452

(Super. Ct. No. BF112229A)

**OPINION**

**THE COURT**\*

APPEAL from an order of the Superior Court of Kern County. Michael J. Bush, Judge.

William A. Malloy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Jeffrey D. Firestone, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Kane, Acting P.J., Poochigian, J. and Franson, J.

## **INTRODUCTION**

The Three Strikes Reform Act of 2012 (Proposition 36) permits third-strike offenders serving indeterminate life sentences for crimes that are not serious or violent felonies to petition for resentencing. (Pen. Code, § 1170.126 et seq.<sup>1</sup>) If a petitioning offender satisfies the statute's eligibility criteria, they are resentenced as a second strike offender "unless the court, in its discretion, determines that resentencing would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

Following the enactment of Proposition 36, defendant Fernandez Singleton Millsap filed a petition for recall of sentence. The trial court, however, found defendant statutorily ineligible for resentencing and denied the petition. Specifically, the superior court found that defendant was armed during the commission of his commitment offense—a conviction for unlawful possession of a firearm.

On appeal, defendant contends (1) the trial court erred by finding he was armed with a firearm during the commission of his commitment offense, as the weapon was not available for offensive or defensive use, and (2) the trial court erred by finding defendant was not entitled to a jury trial on the issue of whether or not he was armed with a firearm. We affirm.

## **FACTS**

On October 22, 2005, Priscilla Monroy contacted the sheriff's department for a civil standby to keep the peace while she retrieved her belongings from the apartment she shared with defendant. Ms. Monroy was concerned for her safety because defendant kept a rifle at the apartment and had once pointed it at her. Two deputies accompanied Ms. Monroy to defendant's apartment, where defendant sat on the couch while Ms. Monroy collected her things. Ms. Monroy informed the deputies that defendant, who was a convicted felon, kept a rifle under the kitchen sink. One deputy looked in a cabinet

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<sup>1</sup> All statutory references are to the Penal Code.

under the sink and retrieved an unsecured, sawed-off .22-caliber rifle from behind a cut-out compartment separated by a small half wall.

A jury subsequently found defendant guilty of being a felon in possession of a firearm and, as defendant had two prior strikes, the trial court sentenced defendant as a third-strike offender to a term of 27 years to life in prison. Following the enactment of Proposition 36, defendant filed a petition for recall of sentence. The trial court denied the petition, finding defendant was armed with the firearm he possessed during the commission of the commitment offense.

This appeal followed.

## **DISCUSSION**

### *I. Defendant was armed with a firearm.*

Defendant argues the trial court erred by finding he was armed with a firearm during the commission of his commitment offense, claiming the weapon's positioning in the compartment under the sink meant it was not available for offensive or defensive use. We disagree.

Under Proposition 36, an inmate is not eligible for resentencing if the inmate's current conviction was "imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (§ 1170.126, subd. (e)(2).) Among the crimes covered under those clauses are any offense where the defendant, during the commission of the offense, "used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii).)

For the purposes of Proposition 36, a defendant is deemed to be armed with a firearm if the facts of the case establish that the defendant had the firearm available for offensive or defensive use. (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029-1030.) As the trial court's eligibility determination is factual in nature, we review that

determination for substantial evidence. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 286; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331; *see also People v. Woodell* (1998) 17 Cal.4th 448, 461 [in determining whether prior offense was qualifying for three-strikes review, “a reasonable trier of fact could find beyond a reasonable doubt that the North Carolina trial court impliedly found that defendant was convicted of the assault because of his personal use of a deadly weapon, and not because of vicarious liability for weapon use by some third party”].)

Here, while defendant did not have the firearm on his person, the evidence showed that it was left unsecured inside an unlocked cabinet in the apartment where defendant was located and that defendant had previously retrieved the rifle and pointed it at Ms. Monroy. Such proximity, accessibility, and prior use is sufficient to support the trial court’s conclusion the weapon was available for offensive or defensive use. For example, in *Hicks, supra*, 231 Cal.App.4th at pages 280-281, 284, a defendant was deemed to have a firearm available for offensive or defensive use despite the gun being found inside a backpack in an apartment, while the defendant was located at the front gate of the apartment complex, in part due to testimony that the defendant had worn the backpack and placed it in the apartment.

Similarly, in *People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1011, 1012, 1018, we held that a defendant was ineligible for resentencing for having a firearm available for offensive or defensive use when he was located in the doorway to his apartment and the gun was found in his wife’s purse in an adjacent room. As we noted then, “[a]s commonly understood, the state of being furnished or equipped with weapons is broader than carrying a weapon on one’s person.” (*Id.* at p. 1015.) In the instant case, it would have taken defendant mere moments to reach the kitchen from anywhere within the two-bedroom apartment in which he resided, and acquire the firearm that was placed unsecured within a kitchen cabinet. Indeed, the evidence of his past conduct showed he had done just that. Accordingly, we conclude sufficient evidence

supports the conclusion defendant had a firearm available for offensive or defensive use at the time of his commitment offense, and the trial court did not err by finding defendant ineligible for resentencing under Proposition 36.

*II. Defendant was not entitled to a jury trial on the question of whether he was armed.*

Through supplemental briefing, defendant contends the trial court erred in not granting him a jury trial to determine whether he was, in fact, armed with a firearm. At the hearing on defendant's petition for recall of sentence, defendant asserted he was entitled to a jury trial on the issue of whether or not he was armed with a firearm during his commitment offense under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). The trial court rejected defendant's position.

Under *Apprendi*, defendants are entitled to a jury trial on any fact that enhances a defendant's sentence beyond the statutory maximum. (*Apprendi, supra*, 530 U.S. at p. 476.) A finding of statutory ineligibility for resentencing, however, does not *increase* an inmate's sentence; it merely enforces an inmate's pre-existing sentence, which was imposed for offenses proved beyond a reasonable doubt at trial. (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1304-1305.) Accordingly, defendant was not entitled to a jury trial on the issue of whether or not he was armed with a firearm.

**DISPOSITION**

The order denying the petition for recall of sentence is affirmed.